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Nos. 1150, 1151 and 1152

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

DAVID M. GOODMAN,
Petitioner

v.

UNITED STATES OF AMERICA

JOSEPH COHEN,
Petitioner

v.

UNITED STATES OF AMERICA

JOHN V. COUGHLIN,
Petitioner

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONERS' REPLY BRIEF

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THE EXPURGATED DOCUMENTS

The opposition of the Solicitor General attempts to justify the blocking-out and deletion of portions of statements of the chief accusers against petitioners, as did the Court of Claims, on the ground that irrelevant and incriminating matter was thereby kept from the Civil Service Commission. Whether this was, in fact, the reason for the deletion is

questionable, in the light of the prejudicial remarks inserted into the Civil Service Commission record by the Customs Bureau relating to evidence of perjury and bribery in the criminal case involving petitioner Joseph Cohen. [App. A, pp. A-27, 28.]

Regardless of the reason for the deletions, however, the point which the Solicitor General completely ignores is that the veterans preference eligible is *entitled* to see the complete statements of witnesses against him. Under the Veterans Preference Act and the Civil Service Commission Regulations, the veteran is given the *right* to cross-examine adverse witnesses. If the complete statements of accusers are kept from him, that right to cross-examine is meaningless. What is "irrelevant" to the court may very well be crucial to the veteran, who has not only a different viewpoint but different facts available to him. If there was prejudicial material to be deleted, the veteran was entitled to be consulted on *what* material should be deleted, *what* inconsistent portions of statements would be presented to the Commission, and *what* inconsistent portions of sworn statements of the chief accuser should be kept from the Commission.

The Government states (p. 6) that petitioners "had access to the complete documents in the Court of Claims." But petitioners did *not* have access to the complete documents before the *Civil Service Commission,* which is where they lost their jobs and where they wanted to use the statements for purposes of cross-examination. The Government states further (*ibid.*) that petitioners "point to no particular wherein they were prejudiced" by the deletions. This is simply untrue. Petitioners noted "many inconsistencies" between the statements given to them and the portions that were deleted. There were at least six such inconsistencies in the statements of Guarna alone. In fact, the very deletions cited by the Government amply demonstrate the prejudicial

nature of the censored documents. To take one example only, "Guarna's initial omission to mention Cohen" (p. 7, n. 4) not only "might have had some value in impeaching [Guarna'] later statement," as the Government concedes, but could have been put to devastating use on cross-examination in the light of Guarna's fear of the Government arising out of his smuggling activities.

REQUESTS FOR APPEARANCE OF WITNESSES

Petitioners Goodman and Cohen discharged their initial responsibility by filing timely affidavits with the Civil Service Commission requesting the appearance of employees of the Customs Bureau. The Customs Bureau flatly refused to bring any of those witnesses to the Civil Service Commission hearing. As a practical matter, it would have been useless for the petitioners to have made personal requests in view of the official position of the Customs Bureau. This is made abundantly clear by the testimony of the Acting Commissioner of Customs, who stated that once the Customs Bureau took the position that requested witnesses were not to appear at the Civil Service Commission hearings, those witnesses would not appear. [Tr., Ct. Cls., p. 78]

THE USE OF UNSWORN TESTIMONY

The opposition brief cites the opinion of the Court of Claims to the effect that the extracts from testimony from criminal proceedings were *certified* copies of portions of testimony. [App. A, p. A-17.] An examination of the Court of Claims record present in this Court will show that *none of the portions of transcripts of the criminal proceedings were, in fact, certified.* All of the transcripts were merely photostats of the transcript in the criminal proceeding. Moreover, there were a number of deletions made in the

the transcripts pages, to which a court reporter would never have given a certification. [See, for example, the findings in paragraphs 27(a) and 39(a) of the opinion of the Court of Claims, App. A, pp. A-36, 47.]

As to the unsworn statement submitted by the Acting Commissioner of Customs in the three cases, the opposition brief characterizes this statement as a "position paper" of the Bureau of Customs. Nothing in the statement by the Acting Commissioner, however, identifies it as being a "position paper." Even more to the point, the statement was considered and used in the record against petitioners just as surely as if it had been the sworn testimony of an eyewitness. As shown by the excerpts quoted in the opinion of the Court of Claims, the statement contained many personal opinions by the Acting Commissioner of Customs relating to the weight and credibility of the evidence against the petitioners. The letter was especially damning because it was completely unimpeachable. [App. A, pp. A-28, 29; A-46, 47.] The Acting Commissioner was requested to be present to testify, but he refused to appear.

The petitioners were entitled to a full and fair hearing by the Civil Service Commission, which they did not receive. The opposition brief of the Solicitor General takes the position that the proceedings in the Court of Claims showed that the evidence suppressed and kept from the petitioners did not prejudice them. However, it was not the function or the right of the Court of Claims to make a judgment as to what the veterans preference eligible would have done had he known the nature and extent of all of the inconsistent testimony of his chief accuser, Guarna, which was suppressed by the Customs Bureau. Moreover, the Court of Claims cannot judge, on the basis of hindsight, what the Civil Service Commission might have done had it known when it considered these three cases that the testimony of the chief accuser was

completely inconsistent on many vital and important points, and, as found by the Court of Claims, that the chief accuser, when he gave his two sworn statements, "did not tell the complete truth." [App. A, p. A-22.]

Respectfully submitted,

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